
In the ORS 656.260 Managed Care Dispute of

Shawna L. Cooley, Claimant

Contested Case Nos: 11-047H & 11-052H

PROPOSED & FINAL ORDER

August 10, 2011

SHAWNA L. COOLEY, Petitioner

CNA CLAIMS PLUS, Respondent

Before Jacqueline M. Jacobson, Administrative Law Judge

Pursuant to notice, a hearing convened in Portland, Oregon on June 2, 2011, before the undersigned Administrative Law Judge. Claimant was present, and was represented by her attorney, Steven M. Schoenfeld. The employer, Osmotics Corp., and its insurer, CNA Claims Plus were represented by attorney Delbert J. Brennehan. The record closed and closing arguments were completed on the day of hearing. On June 29, 2011, the record was re-opened and an Order to Show Cause was issued requiring the insurer to show cause as to why the medical service disputes should not be dismissed for lack of jurisdiction. The record re-closed on July 11, 2011, upon receipt of the insurer's supplemental argument addressing the show cause order.

Two separate exhibit lists were admitted related to the above-referenced matters: Exhibits 1-102 related to WCB No. 11-00047H (herein referenced EXA.); and Exhibits 1-102 related to WCB No. 11-00052H (herein referenced as EXB).

ISSUES

Claimant contests that portion of the Workers' Compensation Division's (WCD) March 30, 2011 Administrative Order finding that she could not continue to treat with James Borden, M.D. as her attending physician. (11-00052H). The insurer contests that portion of the WCD's March 30, 2011 Administrative Order awarding an attorney fee to claimant for prevailing in the second psychiatry opinion issue.

SUMMARY OF FACTS

The Findings of Fact set forth in the March 30, 2011 Administrative Order on pages 1 through 7 are hereby adopted and incorporated by reference. A summary of the facts is provided below:

Claimant suffered a compensable injury on March 2, 2010, and initially sought treatment from Dr. Borden. Her claim was accepted for a thoracic strain.

On April 29, 2010, the insurer enrolled claimant in Oregon Health Systems (OHS), a managed care organization. While Dr. Borden was not a permanent member of the OHS panel of providers, OHS authorized Dr. Borden as a temporary provider to treat claimant, and Dr. Borden continued to provide treatment.

In a letter dated September 24, 2010, OHS revoked Dr. Borden's authorization to serve as claimant's attending physician, and instead required her to seek treatment from a physiatrist. Claimant appealed the September 24, 2010 decision. OHS affirmed its decision on November 16, 2010. Through her attorney, claimant appealed OHS' decision. Claimant also, separately, requested WCD review of the insurer's denial of her request to obtain a second opinion from a physiatrist.

CONCLUSIONS OF LAW AND OPINION

Attending Physician

The standard for reviewing the Director/WCD's March 30, 2011 Administrative Order is set forth in ORS 656.260(16), which provides that "the order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law." *See* OAR 436-001-0225(2). Claimant does not assert any error of law. I therefore review the record to determine if the order is supported by substantial evidence.

Substantial evidence supports a finding of fact "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). In reviewing a finding to determine whether it is supported by substantial evidence, the reviewing entity must "evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990). As the Court of Appeals has explained, "'substantial evidence' review is not what has been referred to as the 'any evidence' rule * * * but it is also *not de novo* review." *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62 (2006) (quoting *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988)) (emphasis in original).

In *Mundell*, the court explained that

"in reviewing the [WCD's] order for substantial evidence, the ALJ was limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the [WCD's] position could have made the findings that the [WCD] actually made. The ALJ does not have authority to determine whether the record could support findings different from those reached by the [WCD], nor does the ALJ have authority to reweigh the evidence and substitute its view of the evidence for that of the [WCD]." 219 Or App at 363.

As discussed by the WCD, the OHS Provider Manual indicated that the attending physician is responsible for describing the physical capacities of the injured worker at each visit, as well as providing a diagnosis, denoting any pre-existing conditions, subjective and objective data, prognosis and treatment plan. (EXA. 14-2).

The WCD concluded that Dr. Borden did not provide a complete treatment plan and did not include objective findings of physical capacities of level of function to meet the OHS requirements. After reviewing this record, I conclude that a reasonable factfinder could have made the finding that Dr. Borden's documentation was insufficient to meet OHS' requirements. Consequently, I find that the WCD's order is supported by substantial evidence and must be affirmed.

Attorney Fee

With regard to the insurer's contention that the WCD erred in awarding an attorney fee related to claimant's successful appeal of the insurer's denial of a second physiatrist's opinion, I similarly find no basis to deviate from the WCD's order. On December 15, 2010, claimant, through her attorney, filed an appeal to the WCD of the insurer's denial of her request for a second opinion from a physiatrist. (EXB. 81). Claimant was examined by Jeffrey I. Gerry, M.D. on December 27, 2010 for a second opinion. (EXB. 86). While the insurer argues that it agreed to pay for the second opinion on December 14, 2010, I find no evidence in the record indicating that the insurer revoked its denial prior to receipt of the appeal by claimant's attorney. Accordingly, I find that claimant's attorney was instrumental in obtaining a settlement of the dispute and is entitled to an attorney fee, payable by the insurer, pursuant to ORS 656.385 and OAR 436-001-0410.

ORDER

The Workers' Compensation Division's March 30, 2011 Administrative Order is affirmed in its entirety.